Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Joint Petition Filed by Dish Network, LLC, the United States of America, and the States of California, Illinois, North Carolina, and Ohio For Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules.	CG Docket No. 11-50.

and

In the Matter of The Petition Filed by Philip J. Charvat for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules.	CG Docket No. 11-50.

and

In the Matter of The Petition Filed by Dish Network, LLC for Declaratory Ruling Concerning the Telephone Consumer Protection Act (TCPA) Rules.	CG Docket No. 11-50.

SUPPLEMENTAL REPLY COMMENTS OF ROBERT BIGGERSTAFF

INTRODUCTION

Robert Biggerstaff respectfully submits the following reply to the comments filed in the above captioned proceedings.

Reply to Comments of the American Teleservices Association

No commenters have disagreed with an important concept which was recited in the ATA's comments, where it acknowledged that "sellers are frequently in the best position to oversee and police compliance of third party vendors to ensure that the sellers' goods and services are marketed to consumer in a compliant manner"[1] This truism is also recognized by the Comments of the United States.[2]

However, the notion that a seller should escape liability if it is "actively involved" in monitoring their vendors' compliance, is misguided. Besides being hopelessly ambiguous, such a system would reward laxity. This can not stand, particularly considering that the Commission holds "laxity" to be evidence of a willful violation of the Commission's rules.[3]

The comments in these proceedings demonstrate that the correct balance is to place liability on the seller. This properly incentivises the seller to use only

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[1] ATA Comments at 3. See also, Comments of Nathan Burdge at 5;

[2] Comments of the United States at 13. *See also* Comment of the Federal Trade Commission at 7 ("The seller alone is in the best position to monitor the manner in which its products are marketed because it knows who is marketing and because it benefits most substantially from those marketing activities.")

[3] *In re Liability of Midwest Radio-Television, Inc.*, 45 FCC 1137, 1141 (1963).

reputable marketers and to take proper steps to ensure illegal calls were not made. If illegal calls are still made, that is prima facie proof that the sellers' "monitoring" was inadequate. In such instances, the seller can rely on its contract with its vendor for indemnification to be made whole for any breach by the vendor that created TCPA liability for the seller.

Reply to Comments of AT&T, Inc.

The notion that Congress intended strict liability for DNC violations, but no strict liability for automated calls (faxes, autodialers, and prerecorded messages) has no purchase. The Commission has already made clear that strict liability exists under the automated call section of the TCPA.[4] There is no occasion for walking back the cat. If AT&T's interpretation were correct, only the person who "pressed the button" would be liable for junk faxes—yet the long-standing interpretation of the Commission is just the opposite. The Commission has already ruled on strict liability of prerecorded calls by third parties for debt collection.[5] The bifurcation AT&T suggests is simply not possible without repudiation of years of Commission action and well-settled interpretations.

It is true that the "on behalf of" language is, per se, not present in the automated call section of the TCPA. But neither is there language limiting

[4] See Comments of Robert Biggerstaff at 8–9; Comments of the United States at 8.

[5] See Comments of Robert Biggerstaff at 8.

"make", "initiate" or "send" to the person who "pressed the button" on the device. The Commission has properly interpreted those words broadly to include direct and indirect actions by a seller through a third party. The court have recognized this construction.[6] Nothing in the language, structure, or history of the TCPA compels a different result. The Comments of the United States demonstrate the appropriateness of such a construction.[7]

The difference in language between §227(b) and §227(c) is obviously intended to limit interpretative discretion of the Commission in the latter subsection, in accordance with Congressional intent. The language difference in the TCPA removes Commission discretion in §227(c), but leaves that discretion intact in §227(b). The Commission is free to interpret "use", "make", and "initiate" in §227(b) either broadly or narrowly. However, Congress compelled a broad application in §227(c) by using the "or on behalf of" language in the statute. Any other interpretation fails, as Congress' specificity in §227(c) would anticipate equal specificity if it intended to remove from the Commission the discretion to adopt a broad interpretation of the provisions of §227(b).

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[6] *See Zeid v. Image Connection*, 2001 TCPA Rep. 1044, 2001 WL 36107699 (Mo. Cir. Oct. 30, 2001) ("The FCC obviously construes the term 'use' in the TCPA's prohibitions to include both direct use, and indirect use by way of an agent."); *Covington & Burling v. Int'l Mktng. & Research, Inc.*, 2003 TCPA Rep. 1164, 2003 WL 21384825 (D.C. Super. Apr. 16, 2003) (same).

[7] Comments of the United States at 6–7.

Reply to the Comments of DIRECTV and the Comments of DISH Network, LLC.

As a threshold matter, it is disingenuous, at best, to argue on one hand that it has no control over the retailers, but at the same time, explicitly exercise control by forbidding an explicit list of telemarketing acts.

DIRECTV seems to argue both sides of the fence. On one hand, it claims that illegal telemarketing by retailers results in "costs and inherent damage to DIRECTV"[8] while a page earlier, it claims that if it were held liable for TCPA violations, there would be less incentive to prevent them. If DIRECTV is to be taken at its word, the value to DIRECTV from illegal robo-calls is worth more than the "costs and inherent damage to DIRECTV" from those calls—else DIRECTV would be doing more to stop them.

What will stop the illegal telemarketing dead in its tracks, is if DIRECTV and DISH actually enforced their contracts with marketers and put teeth in the anti-telemarketing clauses. Their contract already prohibit illegal telemarketing, and already provide for indemnification. If the marketers know that DIRECTV and DISH will actually come after them for that indemnification, they will not engage in such illegal calls. As it is now, the only clawback they go after is if the new

[8] Comments of DIRECTV at 5, n.6.

customer doesn't remain a customer for the specified period—and both DISH and DIRECTV enforce that clause with vengeance.

What we have here is a classic example of an efficacious breach—the marketers breach the contract by using illegal telemarketing, and the other party (DISH, DIRECTV) are more than happy to live with that breach because that breach benefits them.

Dish tries to dismiss prior Commission precedent as "dicta."[9] The precedent that "[c]alls placed by an agent of a telemarketer are treated as if the telemarketer itself placed the call" is certainly not dicta, as it is part and parcel of the substantive rule.

DIRECTV makes several incorrect statements:

> Moreover, it would eviscerate the TCPA's safe harbor provisions if a business were to be held responsible for the independent decision of a third party to breach its contract and violate the TCPA.

There is no "safe harbor" in the TCPA for illegal prerecorded telemarketing calls. To the extent that an affirmative defense exists for live telemarketing calls, that is still available, as it is a *defense* to liability, not a *shield* preventing liability for ever attaching.

> Indeed, beyond (1) imposing contractual rules, (2) reminding retailers about the rules in policies such as DIRECTV's Telemarketing Policy,

[9] Comments of DISH Network LLC, at 16.

> and (3) terminating those retailers that breach their contracts by violating the rules, there is little else that a seller can do.

Indeed, there is much more DIRECTV can do. It can clawback every penny ever paid to a marketer that is found to have used illegal telemarketing. It can conduct surveys of new customers, to determine how they were solicited. It can set up a hotline for complaints and always provide the identity of the retailer to the consumer upon request. It can actually seek damages from a retailer for breach of contract, rather than "terminate" them and continue paying them their residuals.... only for them to surface a few months later with a new name to start the same game over again.

> DIRECTV could find itself facing liability for third party telemarketing speaking generally to "pay television services" even if such telemarketing was intended to result in the sale of a competing service.

Liability would not attach to DIRECTV unless a relationship is formed by which DIRECTV is positioned to accept the benefits of such calls. If Company A was making illegal calls for "pay TV service" but there was no contract or relationship was ever in place (including through intermediaries) where DIRECTV would accept that lead illegally generated by Company A, and DIRECTV did not subsequent acquire the leads, the DIRECTV has no fear. But if the call was marketing exclusive content only available from DIRECTV, that would demonstrate a relationship existed with DIRECTV, and not some other company.

> Indeed, such vicarious liability does not advance the goals of the TCPA and is likely to jeopardize the goals and effective enforcement of the TCPA. If the company whose goods and services are being marketed is to become liable for any independent retailer's telemarketing activities—even activities specifically prohibited by the seller—there would be less incentive for third parties to comply with the TCPA because they would know another company (likely with a deeper pocket) would share (or entirely bear) the liability for their actions.

DIRECTV misapprehends the nature of vicarious liability. Holding DIRECTV jointly liable in no way lessens the liability of the marketers. What it does do, is greatly increase the likelihood that the marketer will actually get caught, and have to pay for its illegal calls because DIRECTV will seek indemnification.

DIRECTV claims that the current paradigm is in the best interest of consumers "who currently enjoy a varied marketplace in which to shop for goods and services." What consumer actually have, is a varied array of illegal lead generation calls. As someone who has logged and tracked illegal telemarketing calls for over a decade, almost none of those calls are made directly by the seller, but are almost exclusively the domain of third-party marketers and lead generators. The status quo—which DIRECTV is desperate to perpetuate—is decidedly not in consumers' best interests.

DIRECTV claims that "if a retailer is found to have violated the Telemarketing Policy, that retailer is terminated." But why does DIRECTV not clawback payments already made to the retailer? Why does DIRECTV not refund

the payments from each customer brought to DIRECTV by that retailer? Why does DIRECTV not seek indemnification from the retailer? Why does DIRECTV not regurgitate its benefits from its relationship with that retailer?

DIRECTV claims that "If third parties conclude that the blame and financial responsibility for their independent and illegal telemarketing activities will be shifted to the seller, they will have little incentive to comply with the TCPA." On the contrary, if third parties knew they would lose any income derived from illegal calls because DIRECTV would actually enforce its identification rights, the third parties would stop making those illegal calls.

DIRECTV never addresses the issue of indemnification (and conveniently omitted the indemnification clause from the copy of its retailer agreement it submitted). DIRECTV would *always* be made whole by such indemnification for any TCPA liability arising from TCPA violations by its retailers that benefitted DIRECTV. At any time, the hold-backs and future payments due to retailers from DIRECTV will provide both indemnification to DIRECTV for any TCPA liability, and provide the incentive to the retailer to comply with the TCPA.

Reply to the Comments of Stewart Abramson

Of the numerous consumers who provided direct evidence of and experience with illegal prerecorded calls, Mr. Abramson's comments reveal important data regarding the ability of sellers to control illegal calls made for their benefit. In

multiple contexts, when the seller finally had the incentive to do so (a lawsuit), it put an end—quite effectively—to illegal calls by its marketers.[10] I can confirm that his experience is not unique. My own records of robo-calls show that such calls for DISH and DIRECTV service effectively ended in concert with the government's legal actions against those sellers. It is well settled that subsequent remedial measures are evidence of the ability and right to control. Other comments, such as those by Mr. Shields[11], further belie the notion that DISH and DIRECTV have no control over their retailers and should have no liability.

Reply to the Comments of The States of California, Illinois, North Carolina, and Ohio.

In identifying benefits to sellers whose marketers employ illegal robo-calls and advantages they obtain over their law-abiding competition, one important aspect was overlooked—the *overall* reduced cost of obtaining the new customers. Leads that are pre-screened to be interested in a particular product are very valuable. Legally acquiring those leads takes advertising. I note DISH and DIRECTV, as well as alarm companies, insurance agents, mortgage brokers, and carpet cleaners, all advertise in the local bi-weekly coupon packets, newspapers, and local TV. Most businesses keep very careful records to determine the cost for each new lead produced by various advertising methods. They know their

[10] Comments of Stewart Abramson at 2.

[11] Comments of Joe Shields at 2.

conversion rates for turning a lead into a customer. So when someone offers pre-screened mortgage leads for $6, which normally cost $100 when legitimately obtained, the scofflaw not only gets more new customers, he pays less for them then his law-abiding competition.

This is an important distinction, since a creative venture could employ some small amount of "legal" advertising like direct mail, accompanying a large amount of illegal robo-calls, and co-mingle all the leads generated from all sources. This will provide a very low aggregate cost per lead, while attempting to create a smokescreen that it can't segregate the illegal leads from the legal ones. But the fact is that even the "legal" leads are made economical, and their cost lowered, by the addition of the cheaper illegal leads to the pot. Because this intentional co-mingling benefits the scofflaw, it must not be permitted to create a liability defense. Because co-mingling lowers the overall cost of all the leads, when the seller buys any of these lower-cost leads, and benefits from them, they are also buying the liability that was created by the illegal calls that provided that lower cost.

Reply to Other Comments

For the record, I substantially agree with and support the comments of the United States as setting forth a correct and appropriate findings. I also fully support the positions set out in the Comment of the Federal Trade Commission.

Other Issues

The comments in these proceedings show that the current state of the telephone infrastructure in this country is being exploited by illegal robo-callers. They are able to very effectively obfuscate the source of their calls. When obtaining call records from various telephone companies in order to identify the source of illegal robo-calls, I have repeatedly been met with obviously falsified data, missing data, invalid data, and just plain lack of cooperation from telephone service providers. It would be tragic if criminals were using the same practices to thwart law enforcement abilities to track the criminals' phone calls.

To put it plainly, if law enforcement is meeting with the same obstacles litigants are meeting when trying to identify the sources of phone calls, then many criminals are escaping the law. If law enforcement is getting more accurate or better results from telephone company records than litigants in TCPA cases are receiving, then we are owed an explanation for that disparity. In either case, further inquiry by the Commission warranted.

I respectfully suggest that the Commission should open a proceeding under its inherent authority, to solicit comments from those involved in attempting to obtain and use telephone records to identify the sources of illegal calls. Consumers and law enforcement both expect telephone companies, as the operators of our public telecommunications infrastructure, to have adequate records of the sources

of calls not just for billing disputes, but to accurately identify the sources of illegal calls.

CONCLUSION

Marketeers use illegal telemarketing calls because the are cheap and profitable. They are profitable only because sellers are willing to pay for the leads the illegal calls generate without asking questions about where those leads come from, and willing to continue paying residuals long after a seller discovers the marketer was using illegal telemarketing to earn those residuals. Sellers are willing to buy the leads because the benefits are large, and the sellers think they have no liability for accepting the benefits of these illegal calls. This perverted symbiosis is the engine that powers the illegal robo-call industry.

Taken as a whole, the record in these proceedings (as well as related proceedings 92-90, 02-278 and 05-338) provides overwhelming evidence supporting a Commission rule recognizing that sellers are liable for prerecorded calls whenever they stand to benefit from them. This support is both consistent with prior Commission action, the purpose of the statute, and the public interests reflected in the TCPA as a consumer protection statute. Whether the Commission relies on a non-delegable duty, retention of the benefits, negligent hiring, public interest, plain English, or its own inherent authority to interpret the statute, the Commission has ample grounds, and discretion, to support its continued

administration of the TCPA to place liability on the sellers who are in a position to benefit from the calls, regardless of who "presses the button" and regardless whether the call is a robo-call, a fax, or a text message.

Respectfully submitted, this the 19th day of May, 2011.

/s/ Robert Biggerstaff